Supreme Court, U. S.
FILED
FEB 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1119

AMERICAN INTERINSURANCE EXCHANGE,
PETITIONER,

versus

COMMERCIAL UNION ASSURANCE COMPANY,
ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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The respondent, Commercial Union Assurance Company, respectfully requests that this Court deny the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The order of the district court is reported at 444 F. Supp. 1248 and is printed in Appendix I to the Petition. The opinion of the court of appeals is reported at 605 F. 2d 731 and is printed in Appendix II to the Petition. The

court of appeals' order denying American Interinsurance Exchange's (hereinafter "AIE") petition for rehearing is printed in Appendix III to the Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 12, 1979, affirming in part and reversing in part the district court's order of February 3, 1978 and remanding the case. The order of the court of appeals, granting a motion to file a petition for rehearing out of time but denying the petition for rehearing, was filed on October 23, 1979. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

(1) Do the rules and regulations of the South Carolina Public Service Commission (the applicable provisions appear in Appendix IV to the Petition) and the lease entered into by Walker Trucking Co., Inc. and T. P. Hildebran make the insurance coverage provided by Commercial Union Assurance Company (hereinafter "Commercial Union") to Walker Trucking Co., Inc. (hereinafter "Walker") and Ronald P. Hildebran primary as a matter of law?

(2) Does AIE provide insurance coverage to Ronald P. Hildebran or Walker?

(3) What are Commercial Union's obligations to Ronald P. Hildebran?

(4) Must AIE indemnify Commercial Union for the sums it has spent in defending Walker and for the sums, up to the limits of liability in AIE's policy, which Commercial Union has paid or will pay to settle the pending tort actions against Walker?

STATUTES INVOLVED

The pertinent rules and regulations of the South Carolina Public Service Commission appear in Appendix IV to the Petition.

STATEMENT OF THE CASE

This insurance coverage dispute between the parties was decided by the district court upon a stipulation of facts entered into by counsel for AIE and Commercial Union.

Briefly, AIE entered into a contract of insurance with T. P. Hildebran who owned a 1975 Kenworth tractor. Walker possessed a permit from the South Carolina Public Service Commission to operate as a common carrier on the state highways. Walker leased T. P. Hildebran's 1975 Kenworth tractor to use in its business and obtained from Commercial Union the insurance coverage required by the Public Service Commission. T. P. Hildebran provided Ronald P. Hildebran as a driver, but he was paid by Walker. Ronald P. Hildebran, while driving the 1975 Kenworth in South Carolina and on Walker's business, collided with another vehicle resulting in bodily injury and property damage to third parties.

The district court held, because of the lease between T. P. Hildebran and Walker and the rules and regulations of the Public Service Commission, that AIE owes neither insurance coverage nor a defense to Ronald P. Hildebran or Walker Trucking and that the responsibility for providing insurance coverage and defending Ronald P. Hildebran and Walker lies exclusively with Commercial Union. The district court also found that certain Covenants Not to Sue entered into in connection with the underlying tort claims are binding only between the parties to them and do not relieve Commercial Union of its duty to defend any insureds under its policy.

The court of appeals affirmed the district court's finding that the Covenents Not to Sue are binding only between the parties to them and do not relieve Commercial Union of its duty to defend any insureds. Yet, the court of appeals reversed the remainder of the district court's order and remanded the case for the entry of a declaratory judgment incorporating the conclusions that: (1) both AIE and Commercial Union owe coverage to the driver of the truck, Ronald P. Hildebran; (2) both AIE and Commercial Union owe coverage to the lessee, Walker; (3) AIE's coverage of both the driver and the lessee is primary and Commercial Union's coverage is excess and (4) AIE must indemnify Commercial Union for the sums it has expended in defending Walker and for the sums, up to the limits of the AIE policy, that Commercial Union has paid or will pay to settle the negligence actions against the lessee, Walker.

REASONS FOR DENYING THE WRIT

Rule 19 of the Rules of the Supreme Court expresses a policy that a review on writ of *certiorari* will be granted "only where there are special and important reasons therefor." The present case presents nothing but an insurance coverage question. The resolution of this question affects only a narrow group of insurance carriers. There is no real conflict of decisions, and the decision by the court of appeals is clearly correct.

I

There are no special or important reasons for a review of a decision on an insurance coverage question.

The court of appeals has decided a question of insurance coverage involving state law and the application, or non-application, of the rules and regulations of the state's Public Service Commission to that question. The effect is minimal upon two insurance carriers. The public is not adversely affected because the court of appeals has only decided the rights between the two insurance carriers and their insureds, and the total amount of insurance coverage available to the third-party claimants has been increased. This is a case where the petitioner is asking this Court to review a decision which adversely affects no one but the petitioner. As stated by Chief Justice Taft in 1923 in *Magnum Co. v. Coty,* 262 U. S. 159, 163:

> The jurisdiction [of the Supreme Court to review cases by way of *certiorari*] was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.

If this case were accepted for review, and the petitioner were afforded *all* of the relief it seeks, it would simply be relieved of its duty to pay thirty-five thousand dollars in insurance coverage and an additional, lesser sum in defense costs. There would result in a corresponding decrease in available insurance benefits to the third parties involved in an automobile collision. The effect of the resolution of the coverage question presented in this case is *de minimus* regardless of the outcome. The only interested parties are those with an interest in an automobile collision in South Carolina in 1975.

While the petitioner claims that the Fourth Circuit Court of Appeals has decided an important state question in a way contrary to the policies outlined in state law, it cites no contrary state authority but merely relies upon its own idea of the applicability of the rules and regulations of the Public Service Commission—an idea that was rejected by the court of appeals. The petitioner is only seeking to gain another review of a narrow question involving state law. The isolated significance of the question presented—one of insurance coverage—renders it clearly unsuitable for review by this Court. Also, as in *State of Spie-*

gel v. Commissioner, 335 U. S. 701 (1948), this Court should follow its general policy of leaving undisturbed a court of appeals' decision on a question of state law.

II

There is no real conflict of decisions.

There is no real conflict in the decisions of the circuit courts of appeal. The only circuit which even appears to have adopted a rule contrary to the decision by the court of appeals here is the Tenth Circuit, and the two cases cited by the petitioner are distinguishable because both cases involved an ICC endorsement to the lessee's policy which is not present in this case. Further, in the case of *Argonaut Ins. Co. v. National Indemnity Co.,* 435 F. 2d 718 (10th Cir. 1971), the insurance policy issued to the owner of the automobile in question contained an endorsement making the coverage under that policy excess insurance. There is no such endorsement here. In the *Hagans v. Glens Falls Ins. Co.* case, 465 F. 2d 1249 (10th Cir. 1972), the Glens Falls policy, held to be primary, insured a lessee who had expressly agreed to indemnify its lessor. There was no such agreement here. The other cases cited by the petitioner as contributing to a conflict are decisions by a district court and a state court which do not, in fact, contribute to an asserted conflict between the circuits.

III

The decision below is clearly correct.

The decision reached by the court of appeals involved the construction of two insurance policies to determine what coverage is provided to whom and the question whether the lease and PSC rules and regulations make the lessee's coverage primary as a matter of law.

The petitioner claims the circuit court made an error in deciding the initial question of the coverage provided by AIE because the court allegedly "made a finding of fact which clearly comes within the exclusion (c) of the AIE policy." [Petition, p. 21] Yet, as noted by the circuit court in its opinion at 605 F. 2d at 734, n. 7, the petitioner conceded in oral argument that AIE owes coverage to the driver of the truck and that the only issue as to him is which policy provides primary coverage. Further, the lower court noted that, while AIE's policy contained certain exclusions from coverage which were relied on in the district court, no such argument was raised on appeal. 605 F. 2d at 734. Last, even though it was not raised on appeal, the circuit court addressed itself specifically to exclusion (c) and found it inapplicable because the trailer was owned not by "the insured," T. P. Hildebran, but by Walker Trucking. 605 F. 2d at 734-735. n. 10. While the petitioner imaginatively argues that exclusion (c) is applicable because of the lower court's finding that Walker is an "insured" under AIE's policy, it is clear that exclusion (c) applies only to "the insured" who is, according to the opening paragraph in AIE's policy, that person "named in the declarations." *The insured named in the declarations* of AIE's policy is T. P. Hildebran who admittedly did not own the trailer. The case of *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Hartford Acc. & Indem. Co.,* 310 F. 2d 618 (4th Cir. 1962) does not concern the question presented by the petitioner and is, therefore, irrelevant.

The petitioner also asserts that the circuit court avoided the question of Commercial Union's obligation to Ronald P. Hildebran raised by its finding that Commercial Union owes a duty to defend Hildebran and, further, failed to instruct the petitioner "as to how it could indemnify Commercial Union up to the Petitioner's policy limits and

still afford protection for Ronald P. Hildebran. . . ." The first issue is between Commercial Union and Ronald P. Hildebran. AIE has no standing to raise a question about Commercial Union's obligation to Hildebran. The second issue is urged only because the petitioner finds itself in a dilemma created by its refusal at the outset of the underlying tort claims to defend Ronald P. Hildebran. AIE chose not to participate at its peril and, now that the lower court has found AIE's coverage and duty to defend Ronald P. Hildebran primary, is stuck with what appears in retrospect to be a bad decision on its part. While it is understandable that AIE wants some relief from an improvident move, the questions raised by the petitioner were not raised in the courts below and are presented for the first time in the Petition. As stated by Mr. Justice Stone in *Duignan v. U. S.*, 274 U. S. 195, 200 (1926): "This court sits as a court of review. It is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed." The present dispute over insurance coverage is certainly not an exceptional case. The only questions presented in the lower courts were the two questions incorporated in the stipulation of facts before the district court. *See* the Petition at 9-10. The second question in the stipulation concerns the Covenants Not to Sue, and it was passed upon by the district court. 444 F. Supp. at 1253-1254. Since the petitioner did not cross-appeal from the district court's order in this regard, and the court of appeals affirmed the district court on this point, the petitioner's appeal from the circuit court's decision does not bring up this question for review. *Harrison v. Perea,* 168 U. S. 311, 326 (1897).

The ruling by the Fourth Circuit in this case that the PSC rules and regulations and the lease have no effect upon the question of whose coverage is primary is in accord with

similar decisions in the Third, Fifth and Eighth Circuits. *See Carolina Cas. Ins. Co. v. The Ins. Co. of North America,* 595 F. 2d 128 (3rd Cir. 1979); *Carolina Cas. Ins. Co. v. Underwriters Ins. Co.,* 569 F. 2d 304 (5th Cir. 1978) and *Miller v. National Farmers Union Prop. and Cas. Co.,* 470 F. 2d 700 (8th Cir. 1972). *See* also *National Mut. Ins. Co. v. Liberty Mut. Ins. Co.,* 196 F. 2d 597 (D. C. Cir. 1952), *cert. denied,* 344 U. S. 819 (1952). The logic of the court below is unquestionably sound. Since the PSC rules and regulations were designed to protect third-party members of the public, there is no reason to alter the contractual rights of two insurance carriers when the benefits to those intended to be protected are not reduced or altered. The public policy behind the PSC rules and regulations was fulfilled when Walker obtained the insurance coverage required. Making that coverage primary, despite the clear terms of the contract, results in no further protection to the public and is, therefore, unnecessary. The lower court's ruling on this question is clearly correct.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of *Certiorari* should be denied.

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